

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**E.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Ponce, PR, Employer**

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**Docket No. 17-0015  
Issued: March 8, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 30, 2016 appellant filed a timely appeal from an April 6, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Because more than 180 days elapsed from the most recent merit decision dated March 10, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from April 6, 2016, the date of OWCP's last decision was October 3, 2016. Since using October 5, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is September 30, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below. On June 8, 2010 appellant, then a 51-year-old mail processing clerk, filed a Form CA-2a, claim for a recurrence of disability alleging that on May 8, 2009 postmaster C.F. touched his buttocks in a sexual manner while he was walking to his workstation. He indicated that employees began making jokes and sexual comments which caused him to have a nervous breakdown. Appellant asserted that this aggravated his accepted emotional condition. He did not stop work. C.F. noted on the Form CA-2a that appellant's allegations were false and that he continued to work through the month of May 2010. He indicated that appellant was put on administrative leave due to inadequate medical documentation and submitted his recurrence claim a year later.

By letter dated July 30, 2010, OWCP advised appellant that his claim was considered a new traumatic injury as he was claiming a new incident occurred.<sup>4</sup> It advised him of the type of factual and medical evidence needed to establish his claim.

The employing establishment submitted an August 2010 witness statement from August 2010 from R.D., a coworker, who indicated that on May 5, 2009 while walking toward the finance office appellant alleged physical contact between C.F. and appellant. R.D. indicated that during the alleged physical contact they walked through a narrow hallway space and continued to walk and talk. He did not hear concern from appellant. A witness statement from A.C., a coworker, noted that on May 5, 2009 the employees and C.F. were gathered together in a group and the topic of being gay was raised and C.F. indicated that he was not gay and that he was not going to participate in the conversation. A witness statement from L.C., a coworker, noted that on May 5, 2009 he was walking from the drive through the office to the lobby with another employee when appellant alleged that there had been contact between C.F. and appellant. L.C. indicated that he did not witness any physical contact between C.F. and appellant.

In a decision dated August 30, 2010, OWCP denied appellant's claim finding the evidence of record was insufficient to establish that the events occurred as alleged.

On November 30, 2010 appellant requested reconsideration.

In a December 8, 2010 decision, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

On December 22, 2010 appellant again requested reconsideration. He submitted a voluntary withdrawal of his Equal Employment Opportunity (EEO) complaint dated July 9, 2009.

In a decision dated September 23, 2011, OWCP denied modification of the August 30, 2010 decision.

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<sup>3</sup> Docket No. 13-1800, *Order Remanding Case* (issued February 21, 2014).

<sup>4</sup> The prior claim is not presently before the Board.

On March 5, 2012 appellant again requested reconsideration and submitted additional medical evidence. In a decision dated May 9, 2013, OWCP denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On July 29, 2013 appellant appealed his claim to the Board. In an order dated February 21, 2014, the Board set aside OWCP's May 9, 2013 decision and remanded the case to OWCP for further development.<sup>5</sup> The Board found that appellant's letter dated February 24, 2012 was a timely request for reconsideration of the September 23, 2011 decision. The Board noted that although appellant did not use the word "reconsideration" in his letter he provided sufficient detail to discern that he was contesting the denial of his claim. The Board instructed OWCP to apply the standard for reviewing timely requests for reconsideration.

Appellant submitted an arbitration decision dated December 6, 2013 which found that the employing establishment had a right to separate appellant as set forth in a May 29, 2010 notice of separation. However, the employing establishment advised that the separation would be held in abeyance until his OWCP claim, disability retirement, or both were finalized.

By decision dated June 20, 2014, OWCP denied modification of its September 23, 2011 decision. On November 25, 2014 appellant again requested reconsideration. He submitted a copy of the arbitration decision dated December 6, 2013, previously of record.

By decision dated March 10, 2015, OWCP denied modification of the June 20, 2014 decision.

On January 7, 2016 appellant submitted a reconsideration request indicating that he would submit evidence from R.D. which would support his claim and prove that OWCP's decision was in error. He alleged that management harassed him in order to exacerbate his preexisting medical condition. Appellant asserted that his buttocks were grabbed by C.F. which triggered the deterioration of his psychiatric condition. He alleged that C.F. grabbed his buttocks in a sexual manner and R.R., a witness, was present during an interview when C.F. admitted touching appellant's buttocks in a playful manner but not a sexual manner. Appellant indicated that statements from A.C. dated May 27, 2015, L.C. dated May 28, 2015 were submitted to R.D.; however R.D. chose which evidence to submit to OWCP. He believed that OWCP did not have a complete record. Appellant alleged that management manipulated the evidence and that C.F. grabbed his buttocks in a sexual manner and mentioned a gay topic in the meeting.

Appellant also submitted a July 9, 2009 withdrawal of his EEO complaint, his CA-2a claim form, A.C.'s August 2010 statement, R.D.'s August 2010 statement, L.C.'s August 2010 statement, excerpts from the Board's prior order, and excerpts from OWCP's March 10, 2015 decision, all previously of record.

Appellant submitted a letter of warning dated January 7, 2009 in which he was charged with failure to meet the attendance requirement of his position. He submitted a medical certificate dated February 3, 2009. Appellant submitted a settlement agreement dated February 25, 2009 which found the issue of job accommodation would be referred to OWCP and appellant would be provided a copy of his medical record and pay vouchers from 1987 to 1988.

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<sup>5</sup> Docket No. 13-1800, *Order Remanding Case* (issued February 21, 2014).

He submitted a May 27, 2015 statement from A.C. who indicated that he was not present at the conversation meeting and did not have any knowledge of appellant's case. Appellant submitted a May 28, 2015 statement from L.C. indicating that he did not witness the incident as he was walking in front of appellant. He submitted a statement from R.D. dated November 4, 2015 which stated: "I am a witness in the incident between C.F. and appellant on May 5, 2009 (touching buttocks) in the hallway walking to the finance offices." Appellant submitted e-mails from D.S., a union official, to R.D. requesting copies of statements from L.C. and A.C. which had been submitted to OWCP for appellant's claim. An e-mail from R.D. to D.S. dated March 27, 2015 R.D. indicated that he had no knowledge of appellant's new claim and he did not have any statements that were a part of this case.

In an April 6, 2016 decision, OWCP denied appellant's January 7, 2016 request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>6</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

"(i) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

"(ii) Advances a relevant legal argument not previously considered by OWCP; or

"(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."<sup>7</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>8</sup>

### **ANALYSIS**

OWCP denied appellant's emotional condition claim because he had failed to establish any compensable employment factors. Thereafter, it denied appellant's reconsideration request, without a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(b).

or interpreted a specific point of law. He submitted statements dated June 15 and December 30, 2015 and reiterated his allegations that management harassed him in order to exacerbate his preexisting medical condition and that C.F. grabbed his buttocks in a sexual manner which triggered the deterioration of his psychiatric condition. These assertions do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted sufficient evidence to establish that his claimed condition is causally related to any compensable employment factors. This is a factual issue which must be addressed by relevant new factual evidence.<sup>9</sup>

Appellant did not submit any pertinent new and relevant evidence in support of his claim. He submitted a withdrawal of his EEO complaint dated July 9, 2009, a Form CA-2a, recurrence of disability claim, an August 2010 statement from A.C., an August 2010 statement from R.D., an August 2010 witness statement from L.C., excerpts from the Board's prior order and a prior OWCP decision. However, these reports are duplicative of evidence previously submitted and were considered by OWCP's earlier decisions dated August 30, 2010, September 23, 2011, June 20, 2014 and March 10, 2015. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>10</sup> Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant submitted a letter of warning dated January 7, 2009 in which he was charged with failure to meet the attendance requirement of his position, a medical certificate dated February 3, 2009, a February 25, 2009 settlement agreement form from mediation between appellant and the employing establishment addressing job accommodation, copies of his medical record, pay vouchers, and e-mails from D.S. to R.D. dated March 27, 2015 requesting copies of witness statements submitted to OWCP. This evidence is not relevant, however, as the underlying issue is whether appellant has established a compensable employment factor.<sup>11</sup> Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant submitted a statement from A.C. dated May 27, 2015 who indicated that he was not present at the conversation meeting and did not have any knowledge of appellant's case. He submitted a statement from L.C. dated May 28, 2015 indicating that he had not witnessed the incident as he was walking in front of appellant. Appellant submitted a statement from R.D. dated November 4, 2015 who noted that he was a witness to the incident between C.F. and appellant on May 5, 2009. However, this evidence is not relevant as it merely repeats witness statements previously submitted in August 2010 that were previously considered.<sup>12</sup> Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

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<sup>9</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>10</sup> See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>11</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992) (where a claimant has not established a compensable employment factor, the Board has held that it need not address the medical evidence of record).

<sup>12</sup> See *supra* note 9.

On appeal, appellant asserts that he submitted sufficient evidence to establish that he sustained an emotional condition in the performance of duty. As explained, the Board does not have jurisdiction over the merits of the claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 8, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board